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Tracking Liberty

Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law and the Railroad Revolution, 1865-1920*. Cambridge: Cambridge University Press, 2001. Pp. xx, 405. \$65 (cloth), \$23 (paperback).

R.W. Kostal*

This deeply researched and highly intelligent book revisits the theme of personal liberty in American life. Welke's aim, admirably fulfilled in the course of nearly 400 pages of minute illustration and discussion, is to show how American perceptions of bodily integrity and autonomy of action ("self-sovereignty or self-ownership") in the late-nineteenth and early-twentieth centuries "were transformed by mechanised technology, corporate power, and modernized space."¹ This then is a study of American self-consciousness as a nation of free men and women. "My central question," Welke writes, "is how Americans' interactions with technology, with corporate power, and with each other in these years reshaped the lived experience and thus meaning of liberty."² Her book describes the collision between the cherished American ideal of the "free man" moving uninhibited in the world and an illiberal trinity of machines, corporations, and states.

Railroads and streetcars were chosen as the focal point of the study because they "were instrumental in fulfilling a condition of individual liberty: freedom of movement."³ By the 1870s, railroads had become an integral and indispensable aspect of American life. As Welke stresses, however, the site of mechanised transportation was always a contested social, moral, and legal terrain. By the turn of the century the railroad car, station, and platform were among the

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1. BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 1865-1920* ix (2001).

2. *Id.* at xiii.

3. *Id.* at x.

most comprehensively regulated of all American spaces. American men and women became dependent on an industry that had steadily eroded their personal autonomy.

Welke's study consists of three thematic sections each containing three subordinate chapters. Part One addresses the physical and legal ramifications of accidental injury. Part Two examines psychological injury and litigation for "nervous shock." Part Three focusses on train transportation and its implications for perceptions of race and personal status. The first and second parts are linked by a short dissertation on the history of "pain and suffering" as an experience of injury and litigation, and the second and third parts by a digression on how injuries were reconstructed in the courts.

An unvarying methodology is employed throughout the work. Themes and arguments are introduced and then illustrated by recourse to examples drawn from the discrete experience of individual men and women. It is obvious that Welke worked tirelessly to locate contemporary accounts of disputes arising from railroad travel. Litigation transcripts and decisions, newspapers, magazines, government documents, and trade literature all were mined by the hundreds. Perhaps the greatest strength of this remarkable book is the richness of its stories about the clash of railways with American minds, bodies, and spirits. But here a caveat: While *Recasting American Liberty* draws from a vast cornucopia of published and unpublished sources, the reader is asked to accept the authority of specific arguments and generalizations based on a description of one, two, or three incidents which, often, were selected from different states and decades. This approach raises nagging concerns about typicality.

Recasting American Liberty bristles with intriguing lines of argument. In Part One, Welke contends that the size, complexity, menace, and, too often, palpable danger of railway transportation gave rise to a myriad of state and corporate initiatives to control the liberty of patrons. Even the most able-bodied could be suddenly killed in a railway accident. Women, encumbered by impractical clothing, children, and pregnancy were particularly vulnerable to harm. The "safety first" movements spawned by these dangers, Welke argues, "captured a central paradox of modern life: life—individual life—was celebrated and preserved at the cost of individual autonomy."⁴ As the railways proliferated, so did the rules governing those who boarded, rode on, and alighted from them. The numbers of accidents grew so alarmingly fast in the last quarter of the century that companies, municipalities, states, and interstate

4. *Id.* at 41.

commissions responded with a myriad of new regulatory laws. “Human vulnerability, not mastery,” Welke concludes, “marked men’s encounters with technology. Safety could not be left to individual choice.”⁵

The injured did not passively accept their fate. Thousands of men and women sought to vindicate their sense of “bodily integrity” by bringing suit against railway companies. Their lawsuits flooded the courts and presented alarming conceptual challenges to a legal system dedicated at once to equality before the law and the natural inequality of men and women. “The entire structure of the legal system,” Welke contends, “was premised upon a reasoning world of men separate from the emotional world of women.”⁶ In the face of a tidal wave of railway-related litigation, it was problematic enough for judges and juries to sustain the ideal of the “free white man,” still more so to apply it to female litigants.

The evolving common law of railway accidents, Welke argues, could be generous to plaintiffs, but not evenhandedly so. The prospects for a substantial recovery from a jury turned as much on the sex, race, and social class of the plaintiff as on the cause and effect of the accident. Still, plaintiffs were successful often enough (and for sums of money large enough) that by 1900 the railway companies were settling the great majority of claims out of court.

In Part Two of her book, Welke argues that “[f]right and shock were by-products of the industrial era. As much as any particular technology, they defined life at the turn of the century.”⁷ Through personal experience, word of mouth, and print media, Americans confronted the often horrific consequences of machinery gone awry. Railway accidents mangled the bodies, as well as the minds and emotions of victims. New claims for “nervous shock,” and a cluster of neurological symptoms that became known as “railway spine,” were the direct legal by-products of railway calamities. Just as physical injury was comprehended, reconstructed, and compensated through the prisms of gender, race, and class, so too was psychological harm. It was routinely the case that identical injuries would generate different claims from males and females, blacks and whites, rich and poor. Both the comprehension and compensation for psychological injury pivoted on the pre-accident social identity and status of victims.

Nervous shock was no sooner invented as a compensable loss than it was segregated by race and gender. Because of the pervasive

5. *Id.* at 120.

6. *Id.* at 87.

7. *Id.* at 139.

assumption that women were more emotionally fragile than men, nervous shock evolved as an almost exclusively female injury. While a woman could vigorously pursue a legal claim for nervous shock damages, a similarly-injured man could do the same only at risk to his masculinity. Then there was the variable of race. It was commonly assumed that blacks had less finely calibrated minds and emotional lives than whites, and black women almost never made legal claims for mental or emotional injury.

The final thematic section of Welke's book is devoted to railway travel. Here, Welke explores the manifestations of America's deepest social fissures in the experience of the railway passenger. Along with people and goods, railways conveyed American racism and sexism. Ingrained local expectations about the proper segregation by race, class, and sex conflicted with the homogenizing impulses of an increasingly centralized and, in turn, increasingly regulated industry. These conflicts touched off another salvo of lawsuits arising from physical assaults, personal insults, as well as perceived infringements of contractual, constitutional, and statutory rights. This litigation, Welke argues, was rooted in conceptions of personal status. In some cases, for example, white people sued railway companies for having been obliged to share space with blacks. In other cases, blacks sued for equal access to otherwise segregated amenities and accommodations, or for space free from racial and sexual harassment by whites. Black litigants, Welke further asserts, were as likely to have their injuries exacerbated as atoned for in the white-dominated legal system.

The late-nineteenth and early-twentieth century railways and streetcars were the site of considerable confusion about race, gender, and class. Like so many other conflicts associated with the industry, Americans often fought them out in the courts. There judges implemented a growing body of statutory and common law to supplant blatantly discriminatory customs in favour of more (if not very) egalitarian standards of travel and accommodation.

Recasting American Liberty puts some of these arguments beyond sensible doubt. It is obviously right, for instance, that the menace posed by railroads and streetcars invited new and invasive forms of private and state regulation, and that the personal freedom of patrons was constrained in a variety of unprecedented ways. It is equally clear that when Americans were injured or insulted by railroad companies or their passengers, sex, race, and class were key variables in the conceptualization, litigation, and compensation of their claims. There was a price to be paid for the railroad revolution in America, and the price was not shared equally.

Welke is so fluent in the selection and presentation of evidence

that the reader is inclined to accept her authority on particular points. At the same time, however, many assertions would have been usefully reinforced by recourse to quantitative evidence compiled by private companies and regulatory authorities. Too often the experience of one or two people is called “typical” without further support. In other instances, one story is used to rebut the implications of another. For example, Welke describes how Jane Brown, a black prostitute, won a sizeable verdict in an 1880 case involving race discrimination.⁸ In the same paragraph, the reader is then told that “most black women were not as fortunate.”⁹ This is plausible enough, but does a single contrary example, the story of Sallie Robinson’s *unsuccessful* suit, firmly establish the point? And doesn’t the *singular* success of Jane Brown’s lawsuit before a southern white judge and jury deserve an explanation?

Welke’s book is interested mainly in the cultural significance of railway litigation. Sometimes this focus obscures its gritty essence. Welke argues, for instance, that “lawsuits for personal injury were fundamentally about the right to bodily integrity.”¹⁰ This seems a strangely abstract way of thinking about these cases. Is it not far more likely that these cases were fundamentally about financial compensation for loss, only secondarily about other motives? On a similar point, while *Recasting American Liberty* contains an enormous amount of interesting material relating to the people who made claims against railway companies, there is almost nothing about the men—the emergent plaintiffs’ bar of late-nineteenth century urban America—who sought them out, translated them into pleadings, and took them to court. While we are told something of railway company lawyers and “experts” (that they were invariably ruthless and abusively mean-spirited toward vulnerable accident victims),¹¹ Welke’s book all but overlooks the part that the claimants’ lawyers played in the invention of modern personal injury law. Lawyer as “victim-bashing corporate lackey” is present here, but lawyer as “ambulance-chasing flim-flam man” is not. The lawyers who might have been located between these two stereotypical extremes are similarly absent.

For a study that refers recurrently to lawsuits, lawyers, and courts, *Recasting American Liberty* is also oddly wanting for some theory or generalization about what the American legal system actually did (or did not do) to mediate the conflict between people, corporations, and the state. The implicit message of the book is that the legal

8. *Id.* at 332-33.

9. *Id.*

10. *Id.* at 105.

11. *See, e.g., id.* at 237, 243.

system was, like America itself, inhospitable and bigoted. It took injured people and hurt them more. That this was true some, or even much of the time, is highly probable. As Welke's own evidence often suggests, however, a far from negligible number of relatively humble people—poor men and women, blacks, even black prostitutes—chose a particular way of fighting back. They went to a lawyer and sued. Which raises some questions not squarely addressed in Welke's book. Why did it occur to these people to seek legal intervention? How did they find legal help? If they were sure to be rebuffed by prejudiced judges and juries, why did they so often bring and sustain lawsuits? What were the techniques and motives of their lawyers? Why did they sometimes *win*? Did the legal system, even in the most illiberal corners of America, exhibit an appreciable autonomy from the forces of capitalism, racism, and sexism? Were the notions of "blind justice," "rule of law," and "equality before the law" more than mere slogans and shams?

The considerable merits of *Recasting American Liberty* are diminished by one other conspicuous problem: an imbalance of perspective. The clarity of its vision is distorted by a pronounced anti-modernity, by the active assumption that the rise of mechanised and corporate-dominated transportation was an unmitigated calamity for American liberty, one only exacerbated by the legal system. Overwhelmingly the "lived experience" of the men and women who populate the book is that of pain, trauma, and conflict. Welke's subjects are almost uniformly portrayed as hapless victims of large and impersonal corporate and legal structures. Their stories are of undoubted historical importance, but clearly they are not the only ones that bear on the subject of American railroads and American liberty.

Where, one wonders, are the experiences of the tens of thousands of people who *enjoyed* riding trains, who often were *eager* to buy a ticket? Where are the families, for instance, who on a Sunday afternoon rattled down the streetcar line to Coney Island, the increasingly ubiquitous tourist on excursion to the Grand Canyon or Niagara Falls, the older men and women who regularly, probably eagerly, caught a train to visit kin in the next city, the next state? And what of the freedom, facilitated by railways, to seek employment in other regions or states? While many Americans surely were scarred by railways, while many felt bullied and coerced by the rules that governed them, many thousands of others also testified to the liberating effects, the sheer pleasure, of taking a streetcar or train. Surely the history of American railroads and American liberty abides in both kinds of stories.